United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 537 (E. I. Dupont de Nemours & Co., Inc.) *and* John McElhaney. Case 11–CB–1670

June 18, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 26, 1989, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. THE 8(B)(2)/8(B)(1)(A) ALLEGATIONS AND THE DUPONT HIRING PROCEDURE

The judge found that the Respondent violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by denying job referrals to John McElhaney, a member of a sister local of the Respondent, who sought referrals on numerous occasions through the Respondent's hiring hall. Specifically, the judge found that: (1) the Respondent was the exclusive source of hiring referrals for E.I. Dupont de Nemours & Co. (Dupont) and other employers; (2) by denying McElhaney hiring referrals for unfair, invidious, and arbitrary reasons, the Respondent violated Sections 8(b)(2) and 8(b)(1)(A); and (3) the denials of referrals also violated Section 8(b)(1)(A) because they constituted discrimination against McElhaney based on his protected activity of having accepted previous employment with a nonunion contractor and having repeatedly attempted to transfer from his local back to Respondent Local 537, of which he had once been a member. We disagree with each one of these findings, at least in part, and so reverse.

The judge's finding that the Respondent and Dupont had an exclusive job referral arrangement is central to his conclusion that the Respondent violated Section 8(b)(2), and necessary to one theory for finding that the Respondent violated Section 8(b)(1)(A). The Respondent excepts to the finding of an exclusive hiring arrangement. We find merit in this exception.

It is undisputed that the Respondent and Dupont were parties to a contractual hiring arrangement for the Savannah River Project which, unlike that followed for referrals to other employers at the Project,[1] contained the following provision:

> In the event that an applicant who has not been referred by the Union applies for employment at the Employer's employment office at a time when the Employer is actually hiring in the applicant's classification, the Employer has the right to hire such applicant provided he meets the experience requirements [set forth elsewhere in the procedures].

The judge found that, despite this provision, there was a contractual ambiguity and that, in practice, the Respondent was the exclusive source of job referrals for Dupont.

We find, unlike the judge, that an exclusive practice was not proved and that the contractual hiring procedure plainly permits Dupont to hire directly. When Dupont is hiring in an applicant's classification, the provision states that Dupont has the right to hire an applicant ''who has *not* been referred by'' the Respondent (emphasis added). The nonexclusivity of the hiring procedure is thus firmly secured by the contract.

Although not entirely clear from his decision, the ''contractual ambiguity'' the judge found may have been based on his reading of the Dupont hiring procedure in tandem with a second set of hiring procedures that contains no reference to Dupont, but which the Respondent identified as applicable to Dupont among other employers. Unlike the Dupont hiring procedure, the general procedures provide that ''[t]he Union shall be the sole and exclusive source of referrals of applicants for employment.'' Nothing, however, in the collective-bargaining agreement between the Respondent and Dupont or in the general hiring procedures themselves bound Dupont to those procedures, and the record does not otherwise establish that Dupont was so bound.[2]

Even if we were to agree with the judge that the language in the referral procedures presents a genuine contractual ambiguity, we find that the General Counsel has not established that the parties have an exclusive referral arrangement by practice and operation. To support his finding of exclusivity, the judge relied on the testimony of Dupont Carpenter Superintendent Houston L. Robertson that the Company relied on the Respondent's business agent, Charles Brewer, ''to send us the people out,'' and on the absence of evidence that Dupont used the provision of the contractual hiring procedures giving it the right to hire individuals applying to it directly for work. But Robertson's statement was in response to the question whether Dupont

[1] See fn. 3, infra.

[2] Assuming for argument's sake that the general hiring procedures were applicable to and binding on Dupont, we note that, under established principles of contract interpretation, ''[w]here there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.'' Restatement, *Contracts*, § 236(c) (1932). Thus, the hiring procedure applicable specifically to Dupont, which is nonexclusive, would take precedence over the general procedures on exclusivity.

requested individuals for referral by name, not whether it used the Respondent as its sole source of referrals, and thus cannot be the basis for a finding of exclusivity. Robertson did testify that the Respondent was the only ''union'' referring applicants to Dupont, but he did not testify that Dupont did not hire individuals applying to it directly for jobs, as permitted by the terms of the hiring procedures.

The judge also relied on the fact that the Respondent had not presented evidence that, in practice, Dupont had directly hired applicants not referred by the Respondent. In so doing, the judge appears to have misallocated the burden, properly placed on the General Counsel, of proving an exclusive hiring arrangement as an essential element of the violation alleged. See, e.g., *Hoisting & Portable Engineers Local 4 (Carlson Corp.)*, 189 NLRB 366, 374–375 (1971), enfd. 456 F.2d 242 (1st Cir. 1972); *Laborers Local 889 (Anthony Ferrante & Sons)*, 251 NLRB 1579, 1581 (1980). Relying particularly on the hiring procedure's plain language permitting direct hires, we conclude that the preponderance of the evidence does not establish that the Respondent operated an exclusive hiring hall system, and, therefore, that the General Counsel has not met this burden.

A union's duty to act fairly and impartially derives from its status as the exclusive representative of employees in a specified unit. *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). No duty of fair representation attaches, however, to a union's operation of a *non*exclusive hiring hall because that union lacks the power to put jobs out of the reach of workers. *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990).

Because applicants can obtain employment with Dupont either through the Respondent's hiring hall or by applying directly, there is no exclusive referral relationship and thus no justification for the imposition of a duty of fair representation in referrals. Accordingly, no instance in which the Respondent may have denied McElhaney job referral without regard to objective criteria, or may have departed from contractually established referral procedures, constitutes a breach of its duty of fair representation in violation of Section 8(b)(1)(A). See *Development Consultants*, 300 NLRB 479 (1990). Further, because the General Counsel has advanced no basis on which to predicate 8(b)(2) liability besides that deriving from the Respondent's alleged operation of an exclusive hiring arrangement with Dupont, we do not find that the Respondent ''caused or attempted to cause'' Dupont to discriminate against McElhaney within the meaning of Section 8(b)(2).[3]

[3] Unlike its collective-bargaining agreement with Dupont, the Respondent's contract with the Morrison-Knudson Company appears to establish it as the exclusive source of job referrals for that employer and its subcontractors. There is, however, no record evidence that McElhaney was denied job referrals to these employers during the period in which the Respondent is alleged to have violated the Act. Accordingly, we do not find that the General Counsel has established a violation of Secs. 8(b)(2) or 8(b)(1)(A) with respect to referral to these employers.

II. ALLEGED 8(B)(1)(A) DISCRIMINATION

As the judge recognized, without an exclusive hiring arrangement, a union's refusal to assist a member in obtaining jobs may violate Section 8(b)(1)(A) when that refusal is in retaliation for the member's protected activity. See, e.g., *Plasterers Local 121*, 264 NLRB 192 (1982). The judge found that the Respondent manifested animus against McElhaney on numerous occasions for his having accepted previous employment with a nonunion contractor, and for his repeated attempts to transfer back to the Respondent from Local 283. Notwithstanding these findings of animus, however, we do not agree with the judge's conclusion that the Respondent violated Section 8(b)(1)(A). As stated in *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248, 1257 (1980):

> [U]nions which undertake, on a non-exclusive basis, to assist their members in finding jobs are doing so in order to advance the interests of [their] membership. . . . [U]nions may legitimately refuse to aid nonmembers who would use their nonexclusive referral services. Thus, it is only *members* of a union operating a nonexclusive referral service to employers with whom the union has no bargaining relationship who have any expectation whatsoever that they will receive referrals to such employers. And it is therefore only *members* who are even susceptible of having their Section 7 rights interfered with by being ignored for referral to an employer. And it is therefore only when a union operating a nonexclusive referral system ignores one of its members because he or she engaged in activities protected by Section 7 of the Act that there is the prohibited ''interference'' with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act. For, any nonmember[s] . . . could hardly be chilled in the exercise of Section 7 rights by a union which fails to refer them when such nonmembers never had any expectation in the first instance that the union would assist them through its nonexclusive hiring hall. [Emphasis in original; footnote omitted.][4]

The complaint does not allege that McElhaney was denied membership in the Respondent because of his

[4] In *Universal Studios*, the Board adopted the judge's decision in the absence of any exceptions having been filed by the General Counsel or the charging party. Thus, the portion of the judge's decision in *Universal Studios* that is quoted above was not considered by the Board, and the Board's adoption of the judge's decision on that point is not a precedent for any other case. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989); *Anniston Yarn Mills*, 103 NLRB 1495 (1953). However, the issue the judge analyzed in *Universal Studios* is now before the Board pursuant to the Respondent's exceptions, and the Board agrees with the pertinent passage of the judge's decision set forth above.

protected activity. Thus, the General Counsel cannot rely on the Respondent's refusal to accept McElhaney back in the Respondent as the basis for claiming that but for that refusal McElhaney would have had the protection accorded members under Section 8(b)(1)(A) and Section 7. Because McElhaney was not a member of the Respondent at any time relevant to the allegations of discrimination in this proceeding, we do not agree with the judge that the Respondent's failure to service McElhaney through its hiring hall violated Section 8(b)(1)(A) in this regard.[5] Accordingly, we shall dismiss the complaint in its entirety.[6]

ORDER

The complaint is dismissed.

[5] We are not holding that a union that otherwise has, or has created, an obligation to a nonmember will never violate the statute by refusing to honor that obligation for reasons that come within Sec. 7 of the Act. We do not join our colleague in making ''new law,'' nor do we agree with her that it is necessary in these circumstances to inquire into whether the Respondent created any reasonable expectation on McElhaney's part that he would be referred out to employers with whom it did not have an exclusive referral arrangement. If, however, we deemed such inquiry to be pertinent, we note that the credited facts eliminate the possibility that the Respondent created any reasonable expectation that McElhaney would be referred after February 8, 1988. (Indeed, no such claim was made or litigated in this proceeding.) The conduct at issue is alleged to have begun February 8, 1988. On that date, in response to his question, McElhaney was told by Business Agent Brewer that he was not on the out-of-work book and that he could return to the ''rat contractor'' he had been working for. McElhaney testified that a ''rat contractor'' is nonunion. McElhaney nonetheless asked and was permitted to sign the book. We find in these circumstances that McElhaney could not reasonably have expected referral to an employer with which the Respondent did not have an exclusive referral relationship.

We further note that there is no evidence that the Respondent had an exclusive bargaining relationship with Dupont.

[6] Member Cracraft agrees with her colleagues that the judge in *Universal Studios* correctly analyzed the issue of under what circumstances will a union operating a nonexclusive hiring hall violate Sec. 8(b)(1)(A) by failing to refer nonmembers. Member Cracraft observes that the judge did not conclude that the Act could never be violated under any circumstances. Rather, the judge held that as a general rule unions may lawfully refuse to aid nonmembers seeking to use a nonexclusive hiring hall. However, as the judge implied in the final sentence quoted above and expressly stated in the subsequent paragraphs of his decision, Sec. 8(b)(1)(A) would be violated if a nonmember had an expectation the union would assist him in referrals and the union failed to do so because of the nonmember's exercise of his Sec. 7 rights. 251 NLRB at 1258–1259. In the instant case, Member Cracraft notes that the Respondent allowed nonmember McElhaney to register for referrals on several occasions and thereby created an expectation that he would be referred for employment. Therefore, Member Cracraft does not join her colleagues in dismissing the complaint. Instead, she would remand the instant case to Judge Grossman to determine whether the Respondent's failure to refer McElhaney violated Sec. 8(b)(1)(A) under principles set forth in the judge's decision in *Universal Studios.*

Member Cracraft finds no merit in her colleagues' response to her dissenting position. First, that no party has expressly claimed that McElhaney had a reasonable expectation of referral comes as no surprise to Member Cracraft given the state of the law at the time this case was litigated. Noting that the Board today is making new law (see fn. 4, supra) and applying it retroactively to the facts of this case, Member Cracraft believes that it is necessary to examine the record to determine whether this key factor is present. In reviewing the positions of the parties, Member Cracraft finds more significant the fact that the Respondent does *not* defend its conduct on the basis asserted by her colleagues, i.e., that after the February 8, 1988 conversation with Business Agent Brewer, McElhaney could not have reasonably believed that he would be referred. Rather, the Respondent argues that its several attempts to refer McElhaney, both before and after the February 1988 conversation, ''dispel any claim that the Respondent was discriminating against the Charging Party.'' Thus, the Respondent's reliance on its servicing of McElhaney through its nonexclusive hiring hall supports Member Cracraft's view that McElhaney did have a reasonable expectation of referral.

Second, Member Cracraft has duly considered Brewer's February 8, 1988 statement to McElhaney that he was not on the out-of-work book and that he could return to the ''rat contractor'' he had been working for. However, in light of the other record evidence, Member Cracraft concludes that Brewer's remarks do not afford a sufficient basis for concluding that McElhaney did not have a reasonable expectation of referral. In this connection, she notes that immediately after Brewer made this statement, McElhaney asked to sign the out-of-work book, and Brewer permitted him to do so. Under these circumstances, Member Cracraft finds that McElhaney could have reasonably discounted Brewer's verbal outburst and regarded as more significant the fact that his name was once again in the Respondent's out-of-work book. Member Cracraft's view is further supported by evidence showing that the Respondent referred McElhaney to employment after the February 8, 1988 conversation.

Jasper C. Brown, Esq., for the General Counsel.
Paul L. Styles and *Frank B. Shuster, Esqs. (Blackburn, Shuster, King & King)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on June 16, 1988,[1] by John McElhaney, an individual (McElhaney). Complaint issued on July 29, and an amendment thereto on September 14. As amended, the complaint alleges that United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 537 (Respondent, or Local 537) failed and refused on February 8 and thereafter to refer McElhaney for employment with E. I. Dupont de Nemours & Co., Inc. (Dupont), pursuant to a written referral agreement whereby Respondent was the exclusive source of referrals to Dupont, for unfair, arbitrary, and invidious reasons. The complaint further avers that Respondent failed and refused to refer McElhaney to other employers pursuant to similar agreements. In so doing, the complaint alleges, Respondent thereby violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Aiken, South Carolina, on November 1. On the entire record, including briefs filed by the General Counsel and Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Dupont is a Delaware corporation with a jobsite located at the Savannah River Project (SRP) near Aiken, South Carolina, where it is engaged in construction work on a nuclear energy plant. During the 12 months preceding issuance of the complaint, a representative period, Dupont received at its SRP construction site goods and materials valued in excess of $50,000 directly from points outside the State of South Carolina. Dupont is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The pleadings establish that Local 537 is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1988 unless otherwise specified.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Referral Agreements and Procedures*

Charles E. Brewer testified that he had acted as Local 537's ''business agent'' since 1979. In that capacity, Brewer averred, he administered the provisions of various collective-bargaining agreements and Local 537's referral procedure, and referred individuals for work with various employers. I find that Brewer was an agent of Respondent within the meaning of Section 2(11) of the Act.

Brewer agreed that he referred applicants for employment to Dupont in accordance with Local 537's referral procedure and the terms of a hiring agreement with Dupont. The referral procedure provides, inter alia, that Local 537 shall be the sole and exclusive source of referrals of applicants for employment. If Local 537 fails to provide the requested number of referrals within 48 hours, the employer may hire other individuals without using the referral system. Although individuals are normally referred in the order of their registration with Local 537, the employer may request by name individuals formerly employed by it on work performed within the geographical area of Local 537. In such case, the employer is required to notify Local 537's District Council of the location of the last job worked and the termination date thereof.[2]

The Dupont hiring agreement, executed by various labor organizations, provides, inter alia, that Dupont must first call on the appropriate union for referrals, indicating the number and qualifications of applicants. Dupont may ''request by name'' individuals formerly employed on work within the building and construction industry. Where Dupont requests employees possessing special skills and abilities, the union shall pass over applicants on the register not having such skills and abilities. In the event that an applicant has not been referred by the Union and applies for employment at the employment office when Dupont is actually hiring in the applicant's classification, Dupont may hire him provided that he meets certain experience requirements set forth in the hiring agreement.[3]

Dupont's Carpenter Superintendent Houston L. Robertson, who supervised Dupont's requests for carpenters, testified that Dupont had a policy of not requesting individuals by name, despite the provisions in the referral procedure and the hiring agreement allowing this process. Robertson further testified, ''Frankly, I don't know what the hiring procedure is . . . . We rely on Mr. Brewer to send us the people out.'' Robertson testified that Local 537 was the only union referring applicants to Dupont. There is no evidence that Dupont utilized the provision in the hiring agreement giving it the right to hire individuals not referred by Local 537.

Another contractor at the SRP to whom Local 537 referred applicants was the Morrison-Knudsen Company, Inc. A ''Project Agreement'' covering the SRP is in evidence, signed by that Company on its own behalf and that of its subcontractors, by the Building and Construction Trades Department, AFL–CIO, and by various other labor organizations.[4] According to Brewer, referrals to Morrison-Knudsen were subject to Local 537's hiring procedure and the ''Project Agreement.'' The latter provides that the employer is subject to the local union's hiring procedures and includes the 48-hour rule described above.

Respondent's witnesses testified and the General Counsel does not dispute that an employer, in addition to complying with the foregoing provisions, was required to hire a certain percentage of apprentices, racial minorities, and females.

B. *McElhaney's Employment History, Qualifications, and Local Union Membership*

Subsequent to the beginning date of Respondent's alleged unlawful conduct (February 8), Local 537 referred for employment about 22 individuals who signed Local 537's out-of-work book after McElhaney did so, as described hereinafter. Respondent gave several reasons for passing over McElhaney. One was that some of the referrals were apprentices, minorities, or females. The parties stipulated, and McElhaney's appearance at the hearing demonstrates, that he is a white male. The record further establishes that he was a journeyman carpenter, not an apprentice, at all relevant times herein. Another reason advanced by Local 537 was that McElhaney did not have a security clearance. Finally, on one particular occasion subsequent to February 8, Respondent contends that Dupont requested by name applicants with special skills in ''stainless steel wainscoting,'' and that McElhaney either did not these skills or that Business Agent Brewer was unaware that he had them.

McElhaney credibly testified that he had been a carpenter for several years prior to 1971 at which time he became a member of Local 537. He affirmed that he had experience in high scaffolding dismantlement, heavy concrete form erection, and stainless steel wainscoting. He had been a superintendent on several jobs. From 1971 to 1973, he was referred by Local 537 for work at the SRP with Dupont and other contractors, doing ''heavy construction'' and ''trim work.'' At this time, according to McElhaney, Local 537 had no out-of-work book. Charles Brewer testified that he ''observed'' McElhaney doing ''form work and scaffolding'' on various jobs. He and McElhaney ''might have spent a week working together.'' Brewer denied knowledge that McElhaney was doing ''wainscoting.'' Brewer averred and McElhaney conceded that the latter never specifically informed Local 537 that he had ''wainscoting'' skills. Brewer also testified that he had worked with 95 percent of the carpenters ''for 30 years or as long as they've been in the program,'' and that he knew ''all the men that's been there from '87 back.'' Brewer's testimony reveals a remarkable memory of individual job histories, assignments, qualifications, injuries, drug and other disabilities, and family relationships of many persons over an extended period of time.

McElhaney described ''wainscoting'' as a ''special trim'' allowing the underlying structure to be cleaned without damage, including the use of steam if necessary. As a result, the structure retains a ''polished appearance.'' He had done such work at a Winn Dixie delicatessen in 1983, and a Kroger store in 1984, in addition to the ''trim'' work at Dupont in the 1971–1973 period. Dupont Carpenter Superintendent Robertson described stainless steel wainscoting as ''the same as wood in here (the hearing room) except it's stainless steel with the matching trim . . . (it requires) special skills . . . .'' Local 537 Business Agent Brewer testified that wainscoting is ''in the trim line.''

[2] G.C. Exh. 4.
[3] G.C. Exh. 5.
[4] G.C. Exh. 2.

In 1973, McElhaney transferred his ''book'' from Local 537 to nearby Local 283, in Augusta, Georgia. He lived about midway between Aiken and Augusta, near the SRP. McElhaney informed Local 283 that he was available for work. In 1977, he obtained a job on his own as a supervisor with a nonunion contractor in North Augusta, South Carolina, and retained this position until 1984. McElhaney paid his union dues and maintained membership in Local 283 during this period, but did not sign out-of-work books at either Local 537 or 283.

C. *McElhaney's Attempted Transfer Back to Local 537 in 1985, and Subsequent Work Assignments*

1. Summary of the evidence

McElhaney testified that he attempted to transfer back to Local 537 in May 1985. He contended that he obtained a ''clearance card'' from Local 283, and presented his ''book'' to Local 537 Business Agent Brewer, saying that he would like to ''clear it in.'' Brewer replied that the ''books were closed,'' that he could not accept any transfers, and that he had a ''document'' from the International saying that he did not have to accept them. McElhaney asked to see the document, and Brewer assertedly replied that he did not have to show McElhaney ''a damn thing.'' There were two other individuals in the union hall at that time, and Brewer told them that they did not have to tell McElhaney anything.

Brewer denied any such attempt by McElhaney to transfer back to Local 537 in 1985. Respondent submitted a letter to it from the International, dated May 10, 1988, authorizing Local 537 not to accept transfer cards for 6 months thereafter.[5] With respect to the 1985 period, Brewer contended that he was ''put on a 6 months special dispensation'' not to accept transfers, and that he would be ''notified what to do'' after this period. Brewer in fact did accept 15 to 20 transfers between 1985 and the date of the hearing herein, during time periods which he did not precisely specify. McElhaney ''didn't come with his book in that time period there . . . What I'm trying to tell you . . . is that I went for a month or maybe 6 weeks and then I took in some members whenever they come'' [sic].

McElhaney testified that after the conversation with Brewer in 1985, he called an officer of Respondent's International who informed him that the International had issued a document ''freezing'' any transfers into Local 537. The officer asked McElhaney whether he had signed Local 537's out-of-work book and, on receiving a negative answer, advised McElhaney to do so.[6]

McElhaney and Brewer agree that the former signed Local 537's out-of-work book in the spring of 1985. McElhaney was thereafter referred for employment, but the evidence is conflicting as to the employer, the date, the location, and the circumstances. According to Brewer, 2 days after McElhaney signed the out-of-work book on April 3, 1985, Brewer ''hired'' him for work ''with M.K. Ferguson at the navy fuel facility.'' Brewer also agreed that this work was at the Savannah River Project. McElhaney testified that he was referred to the Morrison-Knudsen Company in early May 1985, but also testified that he worked for M.K. Ferguson at this time.

McElhaney's testimony, supplemented by his pretrial statement introduced by Respondent, affirms that a week after his conversation with Brewer in early May 1985, another employee, L. J. Thomas, told him that he had been requested by Morrison-Knudsen for work at the SRP. McElhaney appeared at the hall, was referred for work with Morrison-Knudsen, and 2 months later was made a carpenter foreman. Brewer denied that McElhaney had been requested by M.K. Ferguson and claimed to have a ''statement'' from that employer supporting his testimony. Brewer had been unable to fill a job request, saw L. J. Thomas in the hall, and asked him to tell McElhaney to come in for a work assignment. Respondent did not submit any statement from M.K. Ferguson.

2. Factual analysis

This factual dispute is significant because of the General Counsel's contention that Brewer had animus against McElhaney as a result of the latter's repeated attempts to transfer back to Local 537. Brewer's denial that McElhaney requested a transfer in 1985 is contradicted by the tacit admission in his contention that McElhaney ''didn't come with his book'' during the vaguely defined period when Brewer was admittedly accepting transfers during and after 1985. McElhaney's testimony was specific, and he was a credible witness. I find that he requested a transfer in early May 1985, and that Brewer said he had a document from the International saying that Local 537 did not have to accept transfers. When McElhaney asked to see the document, Brewer responded that he did not have to show McElhaney ''a damn thing,'' and advised other members in the hall not to say anything to McElhaney. Based on McElhaney's conversation with the International officer, I conclude that the International in fact had granted Local 537 the authority to refuse transfers in 1985. The duration of this authority is not clear, but it did not extend to 1988.

Resolution of the conflict over the name of the employer to whom McElhaney was referred and location of the work is suggested by the Morrison-Knudsen ''Project Agreement,'' which applied both to Morrison-Knudsen and its subcontractors. The Agreement covered construction work on the ''Naval Reactor Fuel Manufacturing Facility . . . within the geographic confines of the Savannah River DOE site, South Carolina.''[7] I infer that M.K. Ferguson was a subcontractor of Morrison-Knudsen and that the work was performed at the SRP.

With respect to the date of the referral, Brewer, as noted, had excellent recall of many work assignments involving numerous individuals. McElhaney, however, was testifying about only one work history, his own. With respect to this issue, I conclude that his recall was superior to Brewer's. Accordingly, I find that after signing Local 537's out-of-work book in early May 1985, McElhaney was referred for work with Morrison-Knudsen or its subcontractor M.K. Fer-

[5] R. Exh. 10.

[6] McElhaney's testimony about his conversation with the International officer was received subject to Respondent's objection that it was hearsay, and to my ruling that it would not be accepted for the truth of what the International officer said. Thereafter, Respondent introduced into evidence without restriction McElhaney's pretrial affidavit corroborating the substance of his 1985 conversation with the International officer (R. Exh. 1(a)), and, in its brief, avers that McElhaney ''ultimately confirmed the accuracy of the 'freeze' claim by Brewer.'' (R. Br. p. 11, fn. 6).

[7] G.C. Exh. 2, art. III.

guson at the SRP, and was appointed a carpenter foreman shortly thereafter.[8]

D. *McElhaney's Work History from May 1985 to February 1988*

McElhaney worked for Morrison-Knudsen or M.K. Ferguson at the SRP until April 1987, at which time he elected to be laid off pursuant to a reduction in force, rather than continue as a carpenter doing part-time work as opposed to a supervisor working full time. McElhaney then signed Local 537's out-of-work book and applied for benefits with the South Carolina Unemployment Security Commission. McElhaney credibly testified that applicants for state unemployment benefits were required to seek work in order to qualify for such benefits, and that it was common for individuals to work on nonunion jobs until such time that the union could refer them to union jobs.

In late April 1987, the state agency referred McElhaney for work with a nonunion contractor, Weyler-Livsay Company at the SRP. McElhaney was hired as a carpenter supervisor.

Local 537 Business Agent Brewer called McElhaney's home in July 1987, and McElhaney's wife answered the phone. Brewer asked for McElhaney and Mrs. McElhaney informed him that her husband was working. Brewer confirmed that he made this call. When Mrs. McElhaney informed Brewer that her husband was working, Brewer asked where the work was located. Mrs. McElhaney replied that it was at the Savannah River Project. Then, according to Brewer, he ''named the company (Weyler-Livsay),'' and Mrs. McElhaney replied that this was correct.

On December 3, 1987, McElhaney was laid off by Weyler-Livsay in a reduction of force. McElhaney visited Local 537's hall the next day, and asked a man named ''Blackie'' whether he had to sign the out-of-work book again in light of the fact that he had signed in April 1987. ''Blackie'' replied that McElhaney did not have to sign the book again.[9]

E. *The Security Clearance Issue*

As indicated, Respondent contends that one of the reasons it passed over McElhaney for referral in 1988 was the fact that he did not have a security clearance. There is no reference to security clearance as a prerequisite for referral in the hiring agreements or the referral procedure.[10]

Dupont Carpenter Superintendent Houston Robertson testified that he preferred to have individuals with ''Q'' or ''blue badge'' clearance, and that he had communicated this preference to Local 537 Business Agent Brewer. Lack of such clearance imposed a ''hardship'' on Dupont, since an employee without such clearance had to be escorted by a cleared individual when working in restricted areas. According to Robertson, an individual who had been ''off the site'' for as little as ''one day'' had to be ''checked out again . . . by the security department.''[11] McElhaney testified to the same effect, i.e., that an employer must go through the clearance process if an employee has been out for only 1 day.

Local 537 Business Agent Brewer testified that Dupont wanted ''Q-cleared'' applicants as a matter of ''first priority.'' However, this could not be put on a requisition, ''because if they did, I'd have to send them everybody Q-cleared.'' In the absence of a ''Q-cleared'' individual according to Brewer, Dupont wanted somebody who had worked for them ''recently.'' Brewer did not specify how the ''recency'' requirement substituted for clearance.

McElhaney testified on cross-examination that he held a Q-clearance in 1987, and, during rebuttal, that this was at the M.K. Ferguson job at the navy fuels project at the SRP. McElhaney did not specifically refer to Q-clearance on the later Weyler-Livsay job in 1987 which also took place at the SRP. Local 537 Business Agent Brewer affirmed that he knew about McElhaney's security clearance during the M.K. Ferguson job. McElhaney signed Local 537's out-of-work book on February 8, 1988, as more fully described hereinafter. After this signature, in the same handwriting, appears the legend ''(Q cleared),'' which is crossed out.[12] McElhaney testified that he ''had been told'' that his security clearance had expired. Brewer testified that he crossed out the words ''Q cleared'' after McElhaney's name when the latter was in the hall because, he asserted, McElhaney did not have clearance when he signed the book.

F. *McElhaney's Visits to the Hiring Hall in Early 1988, His Conversations with Brewer, and His Signing the Out-of-Work Book on February 8*

1. Summary of the evidence

As indicated, McElhaney visited the hiring hall on December 4, 1987, the day after he was laid off by Weyler-Livsay, and had a conversation with ''Blackie.'' McElhaney testified that he returned on January 22 or 23 and had a conversation with Business Agent Brewer. He asked whether there was any work. Brewer replied that matters were ''awful slow'' at that time of the year, and that he had not had any calls.

---

[8] The evidence is insufficient to warrant a finding that McElhaney was specifically requested, and, accordingly, I do not pass on that issue.

[9] Respondent argues that McElhaney's conversation with ''Blackie'' is irrelevant, since ''Blackie'' has not been established as an agent of Respondent. Brewer testified at length about the handling of Local 537 referrals by a ''Mr. Blackwood.'' Because the complaint does not allege any unfair labor practices prior to 1988, I consider it unnecessary to resolve this issue.

[10] Respondent submitted an order from the Department of Energy dated May 18, 1988, subject ''Personnel Security Program.'' P. 1 of the ''Order'' states that it applies, inter alia, to individuals requiring access to classified information or special nuclear material pursuant to the Atomic Energy Act of 1954, as amended. The exhibit does not contain all the pages of the order, since the next page is numbered ''VII-4,'' and begins with subpar. ''(2),'' apparently of par. ''c'' of sec. 2 on omitted prior pages. Par. (d) deals with termination of access authorized because of ''Foreign Travel,'' and pars. (e) and (f) with other matters. Sec. 3 deals with ''reinstatements'' of individuals whose ''access authorization has been terminated,'' but does not spell out the various circumstances requiring termination. New personnel forms are required if more than 6 months have elapsed since termination of the prior access authorization and more than 1 year has elapsed since the date of the previous form, or any significant changes have occurred. However, in the absence of a new personnel form, the date of birth of the individual will suffice. A review is made to determine whether the individual is the same as the one previously granted access. ''Supplemental investigation'' is required in the event of new derogatory information, or where the previous termination concerned ''eligibility for access information,'' or, ''in any Q-type case,'' more than 5 years have elapsed since the previous investigation. Other sections specify the procedure in supplemental investigations. R. Exh. 9.

[11] Robertson testified that he was ''not in the security business.'' However, it was his opinion that the amount of ''rechecking'' was limited to the duration of absence from the jobsite, and, accordingly, that short absences required less ''rechecking.''

[12] G.C. Exh. 6.

McElhaney did not ask about the out-of-work book because of his prior conversation with ''Blackie.''

McElhaney returned to the hall on February 8, and asked where he was on the out-of-work book. According to McElhaney, Brewer replied that he was not on the book, and had not been on it. Further, Brewer advised McElhaney he could return to work for the ''rat contractor'' he had been working for. According to McElhaney, this term is applied to a nonunion contractor. McElhaney testified that he decided to ''keep his mouth shut'' to avoid a scene, and asked to sign the out-of-work book. Brewer allowed him to do so.[13]

Brewer denied having any conversation with McElhaney until February 8. McElhaney then came in and asked for work. Brewer replied that work was ''awful scarce,'' and that he was sending out ''mighty few people.'' Brewer reminded McElhaney that he had called his wife in July 1987, that she had said McElhaney was working, and that Brewer had then ''named the company'' (Weyler-Livsay, a nonunion contractor). Brewer acknowledged knowing what a ''rat contractor'' was. However, he denied saying anything to McElhaney about the subject. McElhaney signed the out-of-work book.

According to Brewer, another individual had told him that McElhaney was engaged in trapping (fur-bearing animals) at the time of his February 8 visit to the hall. Accordingly, Brewer brought up the subject with McElhaney, and the two of them discussed the matter ''a good little bit.'' McElhaney described his success at trapping and, according to Brewer, told the latter that he would be ready to go to work when the season closed at the end of March.

McElhaney acknowledged that he was engaged in trapping every day in February 1988. However, he affirmed that he was ''available for work'' through Local 537, and denied telling Brewer that he would be available when the trapping season was over. McElhaney testified that he had engaged in trapping at various times during the 23 months he had been working for M.K. Ferguson.

2. Factual analysis

McElhaney's pretrial affidavit avers that he ''argued'' with Brewer on February 8, but does not contain a statement that Brewer told him to return to ''the rat contractor.''[14] On cross-examination, McElhaney testified that he told the Board agent who took his statement about Brewer's ''rat contractor'' remark and the definition of the latter. McElhaney asserted that the agent could not write as fast as McElhaney was talking, and McElhaney could only ''speculate'' as to the reason the remark was left out of the affidavit.

Brewer's reminder to McElhaney in February 1988 that Brewer had identified McElhaney's nonunion employer (Weyler-Livsay) during Brewer's July 1987 conversation with McElhaney's wife shows that this employment was a matter of interest to Brewer. After literally hundreds of conversations which Brewer probably had during the intervening 7 months, as shown by the record, his recall of this minute detail is extraordinary. Brewer's manifested interest in McElhaney's last employer is consistent with the remark attributed to him by McElhaney. The latter's explanation for the absence of the ''rat contractor'' remark in his pretrial statement is plausible, and I accept it. McElhaney was a more believable witness than Brewer, and I credit his testimony that Brewer told him he could go back to work with the ''rat contractor.'' I also credit McElhaney's testimony that he came to the hall in the latter part of January and asked for work.

As indicated, McElhaney went to the hiring hall in December, January, and February, looking for work. This manifested desire for work is inconsistent with Brewer's assertion that McElhaney said he would not be available until the end of March. Why would McElhaney be wasting time and losing money (from trapping) by going to the union hall during the trapping season if he did not want immediate referral to a job? I credit McElhaney's denial that he told Brewer he would not be available until the end of March.

G. *Brewer's Referrals of Individuals Who Signed the Out-of-Work Book After McElhaney*

1. Summary of the evidence

A copy of Respondent's out-of-work book beginning February 8 is in evidence. It shows the name, address, and telephone number of the applicant, as well as the local union affiliation. Race and gender are designated by initials, because of the hiring requirements described above. In addition, security clearance is indicated by the designation ''blue badge,''[15] and the word ''requested'' appears after some names. Although a certain ratio of apprentices to journeymen was said to be part of the hiring requirements, there is nothing in the book to make this distinction. Further, the book does not show the employers' requests, actual referrals, or the employer to whom the applicant was sent.[16]

Brewer testified that he referred numerous individuals who had signed the book after McElhaney because they were apprentices, or, in one instance, a black female apprentice, and the General Counsel does not question these referrals. The principal factual issues concern a request for employees made by Dupont in April or May, and Brewer's response. There is conflicting evidence over the qualifications of employees said to be requested, and whether any persons were requested ''by name.'' This dispute is significant because of Respondent's contentions that only stainless steel wainscoting skills were requested, that McElhaney did not have such skills or Brewer was unaware of them, that McElhaney was passed over because he did not have a security clearance, and, in any event, because the individuals referred were requested by name pursuant to the referral procedure and hiring agreement.

Dupont Carpenter Superintendent Robertson testified that he himself did not make the request—this was done by ''employment personnel.'' He ''needed'' stainless steel wainscoting as the ''primary requisition,'' but also had high scaffolding and heavy form work. After the referrals had been made, Brewer solicited a letter from Dupont as to the nature of the qualifications requested. Under date of June 14, I. B. Lawton Jr., Dupont's employee relations superintendent, sent Brewer a letter reading as follows:

[13] G.C. Exh. 6.

[14] R. Exh. 1(a).

[15] See, e.g., the designation after John R. Allen, who signed the book on February 18. Brewer testified that he made security clearance markings in red, but this color does not appear on the copy in evidence. G.C. Exh. 6.

[16] Ibid.

> As per our 6/11/88 conversation, this is to confirm that our Carpenter Superintendent, R. L. Roberson [sic] has had recent discussions with yourself regarding our carpenter journeyman manpower needs.
>
> Mr. Roberson states that in discussing his needs with you, he advised you that journeymen referred to him at this point in time had to have experience—skills in the following:
>
> High scaffolding dismantlement.
> Heavy concrete form erection.
> Stainless steel wainscoting installation.[17]

After testifying that he himself did not make the employee request, Robertson nonetheless maintained that he communicated directly with Brewer. In response to a leading question, Robertson averred that wainscoting was the ''only'' skill he mentioned. After being shown Lawton's letter, Robertson testified that wainscoting was the ''primary'' reason for hiring the employees. Brewer claimed at the hearing that he did not know ''whose idea it was to put high scaffolding and form on there but it was never brought up.'' Brewer admitted knowledge that McElhaney could do high scaffolding and form work.

Brewer described the following individuals, referred to Dupont, who had signed the book after McElhaney:

(a) John Ledbetter, who signed on February 17, was a journeyman who had been an ''outstanding apprentice.'' ''We knew that he could do the work that Mr. Robertson was wanting.'' Although Ledbetter did not have a ''Q badge'' at the time, he had had ''previous'' experience with Dupont, had a previous security clearance, and had not been ''gone too long.''

(b) Millford T. Odom, who signed on February 17, had formerly worked for Dupont but had been involved in an accident. Brewer asserted that he had previously seen Odom doing ''shop work'' at M.K. Ferguson, i.e., building forms, boxes, window and door frames, etc. ''When you stand around and look at a man for awhile,'' Brewer maintained, ''you can tell whether he can do the work.'' On the basis of this observation, Brewer formed the opinion that Odom could do stainless steel wainscoting. There is no designation of security clearance after Odom's name in the out-of-work book.[18]

(c) Joseph Thomas signed on February 18. Brewer testified that he thought Thomas was an apprentice, and was ''not familiar with him.'' He had not ''been there long.'' Brewer ''looked him up and got familiar with his name.'' Brewer told Robertson that he thought Thomas ''could do the type of work that was requested,'' and Thomas was referred as a substitute for another individual who did not show up. Although Brewer asserted that Thomas was referred because he had a ''blue badge,'' there is no designation of security clearance after Thomas' name in the out-of-work book.[19]

(d) Allen Martin, who signed on February 22, had previously worked for Dupont ''a short time.'' According to Brewer, ''if you had worked for Dupont any amount of time, you have been exposed to all work.'' There is no designation of security clearance after Martin's name in the out-of-work book.[20]

(e) Mike Sininger, who signed on March 1, had ''recently been out there'' (at Dupont), according to Brewer. In addition, Sininger had worked on an addition to Local 537's building, including ''trim work.'' Although there is no designation of security clearance after Sininger's name in the out-of-work book,[21] Brewer contended that they ''were checking on him at that time for a blue badge.''

(f) Eddie Combs, whose signature date of April 1 is crossed off in the out-of-work book, was a carpenter foreman on another job for a different company, and Robertson had observed him. Asked about Combs' skills as a ''trim carpenter,'' Brewer replied that he had sent Combs on jobs 'for people that's wanting door(s) hung, locks put on, or different type of work done, trim work,' and that his work met with approval. Brewer asserted that Combs told him that the latter had done wainscoting in a nuclear plant in West Virginia. There is no designation of security clearance after Combs' name in the out-of-work book.[22]

(g) Sam Norris, who signed on February 17, was from a Chattanooga local, and worked with Combs on the addition to Local 537's building. Brewer contended that Norris told him that he had worked in a Dupont plant at the TVA, and formed the opinion that Norris could do the work requested. There is no designation of security clearance after Norris' name in the out-of-work book.[23]

(h) John R. Allen, who signed on February 18, has a security clearance designation after his name, as indicated.[24] Brewer's only comment about Allen's referral was that he had a ''blue badge.''

In addition to the foregoing referrals to the Dupont job, Brewer attempted to make other referrals. Thus, he called A. Thurp to refer him to a job which he could not remember, but Thurp's phone did not answer. Brewer attempted to call Ronnie Renew on May 10, with the same result. Neither Thurp nor Renew has a security clearance designation after his name.[25]

Brewer was asked why he selected the foregoing individuals instead of McElhaney. His answer is as follows:

> Because part of the men we're talking about had blue badges, others had worked out there recently, had done that type of work, showed experience in the type of work and had worked out there recently on that type of job and was qualified for the specific job that Mr. Robertson was asking for.

Brewer was further asked whether he inquired of McElhaney about the latter's wainscoting skills. Brewer replied that he never asks an out-of-work individual whether he can do a

[17] R. Exh. 8.
[18] G.C. Exh. 6.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

specific job, because ''they're going to tell me they can do it.'' Brewer agreed that he knew that McElhaney had worked for Dupont in the early 1970s, but contended that this was not ''recent'' experience, and that Dupont had ''tightened up'' on its safety program. Brewer also agreed that he did not ask anybody else about McElhaney's qualifications. McElhaney credibly testified that Local 537 once asked him whether he was a qualified welder.

As indicated, Dupont's carpenter superintendent Robertson affirmed that Dupont had a policy of not requesting individuals by name. On direct examination, Robertson testified that he knew John Ledbetter, Millford T. Odom, and Mike Sininger, and that they had recently worked for Dupont. He also knew Allen Martin, but was uncertain whether he had worked for the Company. On cross-examination, Robertson could not remember the names of any of the individuals. Shown the out-of-work book, he recognized only Ledbetter and Odom, and gave April 8 as the date of their referral. In his first appearance as a witness, Robertson testified that he did not recall having a conversation with Brewer about these individuals in April or May. Recalled as a witness, Robertson contended that he did have such a conversation with Brewer in April. On direct examination, Robertson said that he mentioned two names, and, on cross-examination, one. Brewer brought up the other names. Robertson said that he knew ''all of them'' with the exception of Martin, and that they had worked for him ''recently.'' He ''reviewed'' these names with Brewer. The latter did not mention McElhaney. If Brewer had done so, according to Robertson, he would have had no reason to reject McElhaney. The ''wainscoting'' job lasted 1-1/2 years, according to Robertson. Brewer testified that it was he who mentioned names to Robertson. ''He don't necessarily request them but he tells me that they can do the work . . . and I know that most of them can do it . . . [and] that's the way we go at it.''

Robertson also described the genesis of Dupont's letter to Brewer in June, quoted above. Some time after the referrals, Brewer asked Robertson to give him a letter that these individuals had been ''called by name.'' Robertson responded that he could get a letter stating that they had been ''reviewed by name.'' Dupont Employee Relations Superintendent Lawton then told Robertson that he could not send such a letter, because of Dupont's policy against requesting individuals by name. However, Lawton agreed to send a letter specifying the skills which had been requested. Robertson averred that he had had two other jobs involving other skills (scaffolding and heavy concrete form erection) at the time of the request, and that he ''probably mentioned'' these to Lawton. The next question to Robertson was whether he told Lawton about the other jobs, and his answer was, ''I don't think so.'' As shown above, Lawton's letter to Brewer states that Robertson told the business agent that he needed referrals for high scaffolding dismantlement and heavy concrete form erection, in addition to stainless steel wainscoting.[26]

2. Factual analysis

Despite Robertson's contradictions and lack of recall, and his testimony that the employee request was made by the personnel department, I find that he did have a conversation with Brewer about the request. His and Brewer's testimonies about the general nature of this conversation are consistent. I conclude that the conversation took place in the first week of April, because of Robertson's testimony that two employees were referred on April 8.

However, I reject Robertson's and Brewer's assertions that wainscoting was the only skill requested. Robertson, after first stating that this was the ''only'' one, immediately contradicted himself by saying that it was the ''primary'' reason for the request. Robertson further contradicted himself as to what he told Lawton. I do not consider Brewer to have been a reliable witness on this issue. In accordance with the only documentary memorial of this conversation, i.e., Lawton's letter to Brewer, I conclude that Robertson mentioned the three skills listed in the letter.

Robertson further contradicted himself on his knowledge of the individuals referred and the method of their selection, as described above. As Brewer testified, it was he who mentioned the names and Robertson who ''reviewed'' them. Accepting at face value Brewer's descriptions of the referred individuals, it is not clear that Sam Norris or Joseph Thomas met the requirements of recent work for Dupont within Local 537's jurisdiction. In these circumstances, and in light of Dupont's undisputed policy against requesting individuals by name, I conclude that the Company did not request the various individuals by name within the meaning of the referral procedure and the hiring agreement. Instead, they were selected by Business Agent Brewer, with Robertson's concurrence in all instances.

Brewer's selections, and his passing over of McElhaney, did not meet his professed criteria for these decisions. Brewer knew that McElhaney was qualified for the requested scaffolding and form work. Assuming arguendo that stainless steel wainscoting was the only skill requested, McElhaney obviously had this skill. His selection as a supervisor on more than one job suggests the high quality of his abilities in general. Brewer's professed lack of knowledge of McElhaney's wainscoting skill is difficult to believe, considering Brewer's vast knowledge of the skills and assignments of many individuals in general, and his detailed knowledge of McElhaney's assignments in particular. Brewer did not submit a satisfactory reason for his failure to make a direct inquiry to McElhaney about wainscoting or an independent investigation of his skills. The reason that he did give—that he does not discuss skills with out-of-work individuals because, in effect, they lie to him—is contradicted by his admissions that (i) not being familiar with Joseph Thomas, he ''looked him up''; (ii) Eddie Combs told Brewer that he had done wainscoting in a nuclear plant in West Virginia; and (iii) Norris told him that the latter had worked at a Dupont plant at the TVA. In addition, Local 537 asked McElhaney about his welding qualifications. Other of Brewer's judgments that an individual had wainscoting skills were based on evidence which was tenuous to nonexistent—(i) by watching Odom building forms and boxes; (ii) because Allen Martin had been at Dupont ''a short time''; (iii) because Sininger had done ''trim work'' on Local 537's building, and had ''recently'' been at Dupont; and (iv) in the case of John R. Allen, apparently, only the fact that he had a security clearance. Robertson's assertions that he knew ''all'' of the referred individuals and that they had ''recently'' worked for him, i.e., at the Dupont plant at the SRP, are contradicted implicitly by Robertson's relative unfamiliarity with the

[26] R. Exh. 8.

names at the hearing, and by the absence of any such references in Brewer's testimony concerning Joseph Thomas, Sam Norris, John R. Allen, and, partially, Eddie Combs (Robertson said to have observed him while working for another employer).

Finally, Brewer's asserted reason for passing over McElhaney based on his claimed lack of security clearance is obviously specious in light of the other individuals Brewer referred without a record of such clearance. It is significant that Brewer crossed out McElhaney's claim of security clearance in the out-of-work book immediately after McElhaney wrote it in the book, on February 8. How did Brewer have this instantaneous knowledge of the security status of an individual who simply walked into the hall, apparently without advance notice? In any event, as McElhaney and Robertson testified, and as Brewer tacitly admitted in the case of Mike Sininger, the absence of security clearance was caused by as little as one day's absence, and simply triggered certain reinstatement procedures.

H. *McElhaney's Renewed Attempt to Transfer into Local 537, and Grievance*

McElhaney testified that he returned to the hall on April 25 and asked Brewer whether the rule against transfers was still in effect. The business agent replied that books could not be transferred. McElhaney asked whether there was any employment, and Brewer replied, ''No,'' things were ''awful slow,'' and that he received a call only ''now and then.'' Brewer corroborated this testimony by agreeing that McElhaney, in 1988, complained about not being allowed to transfer into Local 537.[27] As previously indicated, McElhaney corroborated Brewer's claim that the International granted authority to refuse transfers in 1985. However, the authority was of uncertain duration, and Brewer in fact did receive transfers between 1985 and the date of the hearing. McElhaney's request thus fell within this period. Although Local 537 received written permission in 1988 not to receive transfers, this permission was dated May 10,[28] subsequent to McElhaney's April 25 request.

McElhaney testified that, about a week after his conversation with Brewer, he called the International, and spoke with International Vice President John Pruitt. According to McElhaney's testimony, Pruitt stated that to his knowledge there was no directive giving Local 537 permission to refuse transfers.[29]

McElhaney went to Local 283, obtained a clearance card, and, in early May, presented it and his book to Brewer for transfer. He told Brewer that he thought he would have a better chance of referral if he was a member of Local 537, and that he was doing what International Vice Presidents John Pruitt and Dean Sooter had told him to do. Brewer replied that General President Sigurd Lucassen had given him a directive, and that the latter was the only one who could change it.[30] The business agent refused the transfer. McElhaney then filed a grievance with the International, and the matter was referred to International Field Representative Bill Nipper.

I. *Brewer's Asserted Attempt to Refer McElhaney in Early May*

Called as a witness for the General Counsel, Brewer contended that he attempted to call 10 individuals, including McElhaney, on May 8 or 9, for referral to Dupont on May 10, and that he made a memorandum of these calls, dated May 10.[31] One of these individuals signed the book after McElhaney did so,[32] two did not sign until after the date of the asserted call from Brewer,[33] while the names of five do not appear in the out-of-work book.[34] It is unclear whether this request related to Dupont's alleged ''wainscoting'' request, but this seems unlikely. The names in the two groups of individuals are not the same.

During his initial testimony on this issue, Brewer said that he was unable to reach 4 of the 10 individuals, including McElhaney, and that the letters ''N.A.'' appearing after their names on the May 10 memorandum mean ''No Answer.''[35] According to Brewer, on either May 8 or 9, between the hours of 2:30 to 7:30 p.m., he called McElhaney three or four times, but did not get a response. This was the ''only day'' he called McElhaney, May 8 or 9. McElhaney and his wife both denied receiving a call from Brewer on May 8 or 9. During later cross-examination, Brewer stated that he attempted to call McElhaney on May 10, without a response. He also asserted that he called McElhaney again on May 10, and that the two of them had a ''big long discussion on that.'' Brewer's testimony does not clarify the subject of the alleged discussion.

I do not credit Brewer's testimony, which is inherently contradictory. It is unlikely that the alleged May 10 ''discussion'' concerned referral to Dupont, because the applicants were due at work that day, and Brewer asserted prior calls to meet this request. Brewer's contention that he called or attempted to call five individuals whose names do not even appear on the out-of-work book is unexplained. Based on these facts, the denials from McElhaney and his wife, and Brewer's unreliability as a witness, I conclude that he did not call or attempt to call McElhaney on May 8, 9, or 10.

J. *The May 31 Meeting on McElhaney's Grievance*

A meeting took place on May 31 at the Local 537 hall involving McElhaney, Brewer, and International Field Representative Bill Nipper. Brewer testified that Nipper called

[27] McElhaney was further corroborated by his pretrial affidavit, introduced by Respondent. According to that document, Brewer told McElhaney that Sigurd Lucassen, general president, had given him the ''directive to refuse books, and that only Lucassen could change it. R. Exh. 1(a).

[28] R. Exh. 10.

[29] At the hearing, Respondent objected that McElhaney's testimony about what Pruitt said was hearsay. I sustained the objection. Respondent moved to strike so much of McElhaney's testimony as related to what Pruitt said, and I reserved ruling. However, subsequent to Respondent's hearsay objection, it introduced McElhaney's pretrial affidavit without restriction. According to that document, Pruitt told McElhaney that he knew of no ''directions'' that books could not be transferred, and that Local 537 could not refuse McElhaney's request to transfer his book into the local. R. Exh. 1(a). In light of Respondent's introduction of this document, I consider it unnecessary to rule on the motion to strike.

[30] Respondent again objected to McElhaney's implied recital of what the International officers had told him. His conversation with International Vice President Sooter is set forth in detail in his pretrial affidavit. He and Sooter exchanged names of individuals who had transferred into Local 537 after issuance of the prior directive. R. Exh. 1(a).

[31] R. Exh. 1.

[32] Gerald Rawls signed February 17.

[33] Larry Sizemore signed May 18; Leroy Havird signed June 16.

[34] Danny R. Curtiss, Julia Hubbard, Larry C. Hollman, Stanley Sams, and Fred Kniffer. R. Exh. 1; G.C. Exh. 6.

[35] R. Exh. 1.

him early in the morning and asked whether he would be in by 11:30 a.m. When Nipper informed Brewer that he would be in with McElhaney for a meeting, Brewer replied that he would not be there because McElhaney was a member of Local 283 whose business agent was McElhaney's agent. According to Brewer, he told Nipper that he had no reason to meet with McElhaney.

McElhaney and Nipper arrived later in the morning. According to McElhaney, after some initial amenities, Brewer said that he had nothing to discuss with McElhaney, that he could discuss matters with Nipper and the latter could report to McElhaney. ''Mr. Nipper looked at Brewer. He told him in a kind voice, 'Now, you can either have the meeting with me and McElhaney at this point in time or else you can go to Washington and have the meeting.''' Brewer then suggested that the three of them go into his office.

Brewer corroborated McElhaney's testimony that the business agent initially objected to McElhaney's participation in the meeting. He denied that Nipper mentioned a meeting in Washington if Brewer refused to meet with McElhaney. Instead, Brewer testified, Nipper said that he represented the International's general president, and that Brewer would either have a meeting or Nipper would ''put the local under dispensation.'' Brewer testified that he did not want to ''jeopardize the union,'' and agreed to have the meeting.

According to McElhaney, Nipper had the out-of-work book in front of him, and asked Brewer about 22 names. Brewer gave an explanation for all but about two or three that he did not know. Some were minorities, one had a ''blue badge,'' and 6 to 10 had been requested by name. Nipper asked for proof of the latter. Brewer replied that he could get letters within a week to 10 days. Nipper asked McElhaney whether he would be satisfied with this, and the latter agreed. Nipper then told Brewer that McElhaney would get copies of the letter. McElhaney denied that he ever received any such copies.

Brewer agreed in general with McElhaney's account of the meeting. However, he denied that Nipper said McElhaney would get copies of the letters proving that Dupont had made requests by name. Brewer asserted that he did send such letters to Nipper. ''Mr. Nipper has a copy of each one of those letters,'' Brewer testified. He then described his attempt to get a letter from Dupont, as related above.

I credit McElhaney's account of these matters as partially corroborated by Brewer. In the absence of such corroboration, I credit McElhaney. I do not credit Brewer's contention that he received and sent to Nipper copies of letters from Dupont proving that various individuals had been requested by name. This assertion is inconsistent with the other credited and documentary evidence in this case, described above. If Respondent had submitted any such letters to Nipper, it would have offered them in evidence during this proceeding.

K. *McElhaney's Ultimate Referral for Employment*

On June 6 and 7, Local 537 referred McElhaney to a job in Georgetown, South Carolina. He declined initially because of inadequate notice, and then, when the offer was repeated, because of concerns about compensation and his out-of-town expenses. McElhaney testified that he waited 16 days after his grievance meeting with Brewer and Nipper, without receiving copies of the employer letters which Brewer said he would send to Nipper, before filing an unfair labor practice charge. The pleadings establish that the charge was filed and served on June 16. On June 20, Local 537 referred McElhaney to a job with Keywood Eastern Company at the SRP near McElhaney's residence, which he accepted.[36] McElhaney credibly testified that Delmar Kellems and Gerald Rawls, who signed the out-of-work book after McElhaney did so[37] were referred to Keywood by Local 537 about 3 or 4 weeks prior to McElhaney's referral, i.e., in about late May.

Brewer testified that Kellems and Rawls had been ''requested by special request,'' and that he could ''get a letter stating that fact.'' At the beginning of the hearing, Respondent proposed and the General Counsel accepted a stipulation as to the individuals which Keywood Eastern had requested by name. Neither Delmar Kellems' nor Gerald Rawls' name is included in that stipulation. Accordingly, I do not credit Brewer's testimony that they were requested by name.

L. *Legal Analysis and Conclusions*

Respondent argues that the provision in the Dupont hiring agreement giving it the right to hire individuals not referred by Local 537, if the individual applies when hiring is being done in his classification, negates the General Counsel's contention that Respondent referred individuals pursuant to an exclusive hiring arrangement.[38] This argument has no merit. In the first place, Local 537's referral procedure which Respondent followed in addition to the Dupont hiring agreement had no such provision. Accordingly, the documentary evidence concerning this exception is ambiguous. In actual practice, as Dupont's Carpenter Superintendent Robertson testified, Dupont relied on Local 537 Business Agent Brewer ''to send us the people out.'' There is no evidence Dupont ever hired one individual not referred by Respondent.[39] In these circumstances, regardless of the contractual ambiguity, Dupont and Local 537 had established an exclusive referral arrangement by practice and operation. *Tenn-Tom Constructors*, 291 NLRB 250 (1988); *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1057 (1985). The fact that certain priorities were established based on minority status, gender, apprenticeship, or skills, or that individuals could be requested by name, does not invalidate a conclusion that the parties had an exclusive hiring arrangement (*Tenn-Tom Constructors*, supra), and the same reasoning applies to the provisions giving the employer the right to hire directly 48 hours after a referral request if the request has not been satisfied. *Teamsters Local 328 (Blount Bros.)*, supra; *Teamsters Local 519 (Rust Engineering)*, 275 NLRB 433 (1985). Accordingly, I find that Dupont and Respondent had an exclusive hiring arrangement. The same conclusion applies to the

[36] In his first pretrial affidavit, McElhaney asserted that the June 20 referral was the only one he had received in 1988. R. Exh. 1(a). McElhaney testified that he thought the Board agent's questions concerned referrals by Brewer, whereas the June 6 and 7 referrals were made by ''Tom.'' In addition, McElhaney averred, since the June 6 and 7 referrals were to an out-of-town location, he thought that they would be attributed to Local 283, of which he was a member. In a supplemental pretrial affidavit, McElhaney stated that his first affidavit was not correct on this issue. He had been called in the early part of June by a man named ''Tom,'' who was a secretary for Local 537. After discussing the reporting time and pay, and, as reported above, his out-of-town expenses, McElhaney asked ''Tom'' to try to fill the order elsewhere. (R. Exh. 1(b)). I accept McElhaney's explanations.

[37] Rawls signed on February 17 and Kellems on February 18. G.C. Exh. 6.

[38] R. Br. p. 30.

[39] See *Laborers Local 394 (Wakil Abdunafi)*, 247 NLRB 97, 100 (1980).

Morrison-Knudsen contract. Even where such arrangement is nonexclusive, a discriminatory refusal to refer individuals for employment is violative of the Act. *Operating Engineers Local 4 (Carlson Corp.)*, 189 NLRB 366 (1971).

The Court of Appeals for the Ninth Circuit has stated the law as follows:

> [W]e have held that it is an unfair labor practice . . . for a bargaining representative to act in an unreasonable, arbitrary, or invidious manner in regard to an employee's employment status [authorities cited]. By wielding its powers arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies [authorities cited]. *NLRB v. Iron Workers Local 433*, 600 F.2d 770, 775 (9th Cir. 1979), enfd. 228 NLRB 1420 (1977).

I conclude that Local 537 Business Agent Brewer manifested animus against McElhaney and nonunion employers by his statement on February 8 that McElhaney could go back to work for the ''rat contractor,'' by his peremptory crossing out of McElhaney's claim to security clearance in light of Brewer's referral of individuals without such clearance, by his refusal to allow McElhaney to transfer back to Local 537 after a prior ban on such transfers had expired and Brewer in fact was accepting transfers, and by Brewer's initial refusal to meet with McElhaney on his grievance when requested to do so by the International's field representative.

All of Local 537's asserted reasons for not referring out McElhaney were pretextual for the reasons specified above. Although Brewer professed that his passing over of McElhaney was pursuant to certain objective criteria, in fact it was not. Although the Dupont hiring agreement gave Brewer the right to pass over previously registered applicants in the case of later applicants requested by name according to special skills, in fact these exceptions were not objectively applied. Because of Brewer's animus against McElhaney and the pretextual nature of the reasons he asserted, it cannot be said, as the Board otherwise concluded in another case, that he sought in ''good faith to determine the qualifications of applicants at the hiring hall, and that certain specific employees had skills and experience that qualified them for the jobs to which they were referred.'' *Tenn-Tom Constructors*, supra.

Respondent further argues that there is no evidence that it was the ''statutorily created exclusive bargaining agent'' of the employees herein, and that in the absence of such status there was no ''duty of fair representation'' of the employees. Respondent contends that under *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), ''an employer may simply walk away from a union on expiration of the contract, (and) it would be manifestly unfair to impose a duty on the union which only flows from the benefit of being a statutorily recognized exclusive bargaining representative.''[40]

The plain language of the statute discloses that this argument has no merit. The prohibitions of Section 8(b) thereof are applicable to ''a labor organization or its agents.'' Such proscriptions are not limited to labor organizations which enjoy the status of bargaining representatives. Respondent's argument leads to the incongruous result that a minority labor organization may engage in the restraint and coercion barred by Section 8(b)(1)(A), and may cause or attempt to cause employer discrimination in violation of Section 8(b)(2), but a statutory bargaining representative violates the Act. Such a conclusion is absurd, and has not been maintained by the Board or the courts. In *NLRB v. Iron Workers Local 433*, supra, neither the Board nor the court made a finding that the union was the ''statutorily recognized exclusive bargaining agent''—merely that it had a collective-bargaining agreement with the employer containing an exclusive hiring hall arrangement. Accordingly, I reject this argument.[41]

I also conclude that the beginning date of discrimination was February 8, 1988, the date that McElhaney applied for referral. The Board has held that ''it is unnecessary to show that jobs were available at the time of the request for referral.'' *Laborers Local 38 (Hancock-Northwest, J.V.)*, 247 NLRB 1250 (1980), enfd. 108 LRRM 2816 (5th Cir. 1981); *Teamsters Local 519 (Rust Engineering)*, supra. The Board has also held that the burden of negating the General Counsel's prima facie case of discrimination in hiring referrals fall on Respondent (*Laborers Local 38*, supra). Although a copy of Respondent's out-of-work book beginning February 8, 1988, is in evidence, it does not constitute rebuttal of the General Counsel's prima facie case, beginning February 8, 1988, because the book does not show employers' requests, the dates thereof, actual referrals, or the names of employers to whom applicants were referred. Brewer testified that he told McElhaney on February 8 that ''work was awful scarce,'' and that he was sending out ''mighty few people.'' This does not constitute evidence that no work was available at that time. On April 25, after Robertson spoke with Brewer about the so-called ''wainscoting'' job, Brewer told McElhaney that ''things has still been awful slow,'' and that Local 537 only received a ''call now and then.'' This evidence supports my conclusion that February 8 was the beginning date of discrimination.

McElhaney was offered a job in Georgetown, South Carolina, on June 6 and 7. He declined because of concerns about compensation and out-of-town expenses. At the time of this referral, McElhaney had been discriminatorily denied referral to Dupont in early April and to Keywood Eastern in late May. Both jobs were at the SRP, near McElhaney's residence, and both were continuing on June 6. Under these circumstances, I conclude that Local 537's out-of-town offer on June 6 was insufficient to terminate the period of discrimination, and that same continued until June 20, when McElhaney accepted a referral to Keywood Eastern at the SRP.

CONCLUSIONS OF LAW

1. E. I. Dupont de Nemours & Co., Inc. (Dupont) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 537, is a labor organization within the meaning of Section 2(5) of the Act.

[40] R. Br. pp. 24–30.

[41] Respondent's argument based on *Deklewa* is misplaced and oversimplifies that case. Repudiation of an 8(f) contract continues to be a violation of Secs. 8(a)(5) or 8(b)(3), despite lack of proof of the union's majority status.

3. Respondent operates an exclusive hiring hall or referral system whereby it refers applicants for employment with Dupont and other employers.

4. Beginning February 8, 1988, and continuing to June 20, 1988, Respondent discriminatorily failed and refused to refer John McElhaney for employment with Dupont and other employers because McElhaney had previously worked for a nonunion contractor and repeatedly attempted to transfer into Respondent Union from another union.

5. By the action described in Conclusion of Law 4, Respondent Union has caused or attempted to cause an employer to discriminate against McElhaney in violation of Section 8(a)(3) of the Act, and Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Local 537 has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily denied John McElhaney referral for employment, I shall recommend that it be ordered to make him whole for any loss of earnings he may have suffered from February 8, 1988, to June 20, 1988, because of such discrimination, less net interim earnings,[42] to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[43]

I shall also recommend that Respondent be required to maintain and make available for the Board or its agents, upon request, all out-of-work lists or books, referral cards, work requests, and any other documents and records showing job requests or referrals and the basis for such referrals of employees, applicants, and members. I further recommend that Respondent be ordered to notify McElhaney in writing that use of Respondent's referral system will be available to him on an equal and nondiscriminatory basis with other employees and applicants, and to so refer him.

I shall also recommend that Respondent be required to post appropriate notices.

[Recommended Order omitted from publication.]

[42] The issue of whether McElhaney's trapping earnings, if any, should be included in net interim earnings may appropriately be considered in the compliance stage of this proceeding.

[43] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 § U.S.C. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).